

9601 et seq., as well as Tennessee common law claims for contribution, unjust enrichment, implied or equitable indemnity, and negligence.

About the time UTC filed its complaint, it filed a Notice of Lis Pendens ("the Notice") with the Register's Office of Shelby County, Tennessee, asserting a lien on the Property in an amount not less than \$779,682.27. (Countercl. ¶ 1.) On June 2, 2005, Defendants filed their answer to the complaint and Defendant Sixty-One also filed a counterclaim against UTC alleging that the Notice constituted a libel of title. The counterclaim requests a judgment expunging the notice of lien and awarding special damages, including attorney's fees and costs.

II. Jurisdiction and Choice of Law

The court has jurisdiction to adjudicate federal claims under 28 U.S.C. § 1331. The court has supplemental jurisdiction under 28 U.S.C. § 1367(a) to adjudicate state law claims arising from the same nucleus of operative facts as the federal claims.

State law claims brought under the court's supplemental jurisdiction are governed by state substantive law and federal procedural law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Super Sulky, Inc. v. U.S. Trotting Ass'n, 174 F.3d 733, 741 (6th Cir. 1999). A federal district court is required to apply the "choice of law" rules of the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Cole v.

Mileti, 133 F.3d 433, 437 (6th Cir. 1998). "Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." Klaxon, 313 U.S. at 496. Therefore, this court must apply the Tennessee rule to determine which jurisdiction's law to apply.

In tort cases, the Tennessee rule is the doctrine of *lex loci delicti*, which applies the substantive law of the state where the injury occurred. Hataway v. McKinley, 830 S.W.2d 53, 55 (Tenn. 1992). The injuries alleged by UTC in its complaint occurred at its property in Memphis, Tennessee, and the injury alleged by Sixty-One in its counterclaim occurred when UTC filed the Notice in the Register's Office of Shelby County, Tennessee. Therefore, the court will apply Tennessee substantive law to the parties' state law claims.

III. Standard for Dismissal Under Rule 12(b)(6)

"Under the liberal notice pleading rules, a complaint need only put a party on notice of the claim being asserted against it to satisfy the federal rule requirement of stating a claim upon which relief can be granted." Memphis, Tenn. Area Local, Am. Postal Workers' Union, AFL-CIO v. City of Memphis, 361 F.3d 898, 902 (6th Cir. 2004). When considering a motion to dismiss for failure to state a claim, the court regards all factual allegations in the complaint as true. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). Further, the court must construe the complaint in the light most favorable

to the plaintiffs." Memphis, Tenn. Area Local, Am. Postal Workers' Union, 361 F.3d at 902. If the plaintiff can prove no set of facts that would entitle him to relief based on a viable legal theory, the claim will be dismissed. Scheid, 859 F.2d at 437.

"The Federal Rules of Civil Procedure do not require a claimant to set out in detail all the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). "To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all material elements of the claim." Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003).

IV. Analysis

To establish a claim for slander or libel of title under Tennessee law, a plaintiff must show that: (1) he has an interest in the property; (2) the defendant published false statements about the title to the property; (3) the defendant was acting maliciously; and (4) the false statements proximately caused a pecuniary loss to the plaintiff. Brooks v. Lambert, 15 S.W. 3d 482, 484 (Tenn. Ct. App. 1999). "[M]alice is a necessary ingredient of the action and must be both alleged and proven..." Waterhouse v. McPheeters, 145 S.W. 2d 766, 767 (Tenn. 1940); Brooks, 15 S.W. 3d at 484. "[A] good faith claim of title, although erroneous, will not constitute a basis for an action of libel of title." Ezell v. Graves, 807 S.W. 2d 700, 704 (Tenn. Ct.

App. 1990). Although the complaint does not necessarily have to allege malice expressly, it must at least allege "sufficient facts to give rise to a reasonable inference that the defendants acted maliciously." Id. The Federal Rules of Civil Procedure also require the complaint to plead malice either directly or by inference because it is an essential element of a claim for slander or libel of title under Tennessee law. Wittstock, 330 F.3d at 902.

UTC argues that Sixty-One's claim should be dismissed because it is barred by the doctrine of absolute immunity for statements related to a judicial proceeding that are pertinent and relevant to that proceeding. The court does not need to reach this argument, however, because the pleadings are insufficient to state a claim for libel of title. The counterclaim neither expressly alleges malice nor sets out sufficient facts to give rise to a reasonable inference that UTC acted maliciously in filing the Notice.

Although the court makes no finding about whether UTC had grounds for filing the Notice, Sixty-One's counterclaim must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted because the complaint does not set out sufficient facts to establish all elements of the claim.

V. Conclusion

Plaintiff's Motion to Dismiss Counterclaim is GRANTED.

So ordered this 28th day of December 2005.

A handwritten signature in black ink, appearing to read 'SH Mays', written over a horizontal line.

SAMUEL H. MAYS, JR.

UNITED STATES DISTRICT JUDGE



Notice of Distribution

This notice confirms a copy of the document docketed as number 30 in case 2:05-CV-02224 was distributed by fax, mail, or direct printing on December 30, 2005 to the parties listed.

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Honorable Samuel Mays
US DISTRICT COURT